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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ROUVENIE ROBIANES et al.,

Plaintiffs and Appellants,

v.

COUNTY OF LOS ANGELES,

Defendant and Respondent.

B174256

(Los Angeles County
Super. Ct. No. MC013949)

APPEAL from an order and judgment of the Superior Court of Los Angeles County. Frank Y. Jackson, Judge. Reversed.

Terran T. Steinhart and Sadiri S. Padre for Plaintiffs and Appellants.

Office of the County Counsel, Lloyd W. Pellman, County Counsel, Tighe F. Hudson, Principal Deputy County Counsel, and Brian T. Chu, Senior Deputy County Counsel, for Defendant and Respondent.

Following serious injuries sustained in a car accident, plaintiffs and appellants Rouvenie and Rodel Robianes filed the instant lawsuit against defendant and respondent County of Los Angeles (the County), alleging that a dangerous curve in the highway caused the accident. The trial court granted the County's motion for summary judgment on the grounds that it did not have notice of the alleged dangerous condition. (Gov. Code, §§ 835, 835.2.)¹ Appellants filed the instant appeal, challenging the trial court's finding that the County did not have notice of the dangerous condition.

We reverse the trial court's order. A triable issue of fact exists regarding (1) whether the curvature in the highway constituted a dangerous condition, (2) whether the County was on notice of this alleged dangerous condition, and (3) whether the County took reasonable action to protect against the risk of injury created by the alleged dangerous condition.²

FACTUAL AND PROCEDURAL BACKGROUND

The Accident

On December 8, 2001, appellants were riding in an automobile northbound on Sierra Highway. Gary M. Plyley (Plyley) was driving on the southbound side of the highway. At approximately 11:20 p.m., Plyley drove his vehicle over the center median of the highway, causing a head-on collision. Appellants' vehicle was totaled and they suffered substantial personal injuries. Plyley was killed.

Appellants' Complaint

On August 15, 2002, appellants filed the instant lawsuit for damages against, inter alia, the County, alleging dangerous condition of public property liability. Appellants claimed that at the location where the accident occurred, the highway contained a

¹ All further statutory references are to the Government Code unless otherwise indicated.

² While the issue of whether the curvature caused the accident was raised in the parties' motion for summary judgment papers, it is not fully developed on appeal.

dangerous curve. They further alleged that the County had actual or constructive notice of the dangerous condition as a result of numerous cross-median accidents at the point of the accident, and that after the County had obtained such notice, it had reasonable time to obtain funds and carry out the necessary remedial work to bring the highway back into conformity with a reasonable plan or design, but failed to do so.

The County's Motion for Summary Judgment

On September 12, 2003, the County filed a motion for summary judgment, arguing that (1) a dangerous condition did not exist on the highway at the accident location; (2) even if it did, the County lacked notice of any such dangerous condition; (3) the County was immune from liability because it took reasonable action to protect against the risk of injury; and (4) the alleged dangerous condition did not cause the accident. Relying largely upon expert testimony from Robert N. Seltzer (Seltzer), the County argued that the curve did not constitute a dangerous condition. The County had completed a road improvement project in June 2001 (six months before the subject accident) that flattened the curvature of the relevant portion of the highway. According to the County, this improvement resulted in increasing the comfortable speed for both northbound and southbound traffic such that advisory speed signs were no longer necessary. Nevertheless, the previously posted signs (including speed signs, Chevron signs to identify the curve, and slippery when wet signs), which had been placed in conformance with the Caltrans Traffic Manual, remained intact.

The County further argued that it had no notice of the alleged dangerous condition, as required by section 835.2. While there may have been accidents prior to the road improvement project, there were no head-on collisions between June 2001 and the subject accident. Absent an accident history, the County was not on notice that the location presented a safety hazard to the motoring public.

In any event, the County urged that it took reasonable action to provide for safe vehicular traffic through the subject curve. It used all appropriate traffic control devices and warning signs, thereby satisfying the requirements of section 835.4, subdivision (b).

Finally, the County argued that the alleged dangerous condition was not the cause of the accident.

Appellants' Opposition to the County's Motion

Appellants opposed the motion. They argued that the road curvature constituted a dangerous condition; a triable issue of fact existed as to whether the reconfigured curve at its sharpest point could be safely negotiated by a car traveling 55 miles per hour.

Regarding the June 2001 roadway improvement project, appellants presented evidence that the project actually sharpened (not flattened) the curve, rendering the curve more dangerous.

With respect to the County's notice, it could not rely upon the fact that there were no accidents in the six-month period following the June 2001 roadway project and the subject accident. According to traffic engineer Harry J. Krueper, Jr. (Krueper), to be statistically relevant, an accident history must develop over three to five years. Thus, the post-reconfiguration accident history is not long enough to be statistically relevant.

Furthermore, appellants disputed whether the County had established that it took reasonable action to protect against the risk of injury created by the dangerous curve. Relying upon expert testimony from Krueper, appellants argued that the warning signs were insufficient remediation for cross-median accidents because the accident rate remained high even after the posting of those signs. Accordingly, a median barrier was required, and the County had sufficient time to have put in a temporary K-rail median barrier until a permanent median barrier could have been installed.

The Trial Court's Order Granting Summary Judgment

After hearing oral argument, the trial court granted the County's motion. It found that it "must determine whether [appellants] have provided sufficient evidence that [the County] had notice post the June 2001 reconfiguration that the subject curve was in a dangerous condition. It appears undisputed that post remediation [appellants'] accident was the only cross-median accident to occur in the relevant area . . . which is far below the County average Thus, it appears [that appellants] have failed to show the accident rate post-reconfiguration was statistically aberrant, i.e.,] unusual or excessive in some respect. See *Compton v. Santee* (1994) 12 Cal.App.4th 591, 599-600."

The trial court found undisputed and correct Seltzer's conclusion that the post-remediation accident history was not statistically relevant to put the County on notice that the post-improvement curve "could still be in a dangerous condition which would warrant further investigation and/or remedial efforts such as a cross-median barrier." "Instead, the relevant period is between June 2001 and the December 8, 2001 accident, and [appellants] have failed to provide evidence[] that [the County] had notice based upon the number of accidents during that time period that the subject curve was in a dangerous condition that required further review and/or remediation."

Judgment was entered, and this timely appeal followed.

DISCUSSION

I. Standard of Review

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

II. *Triable Issues of Fact Exist Regarding Whether the Curvature of the Highway Constitutes a Dangerous Condition, Whether the County was on Notice, and Whether the County Took Reasonable Actions to Provide for Safe Passage of Vehicular Traffic Through the Dangerous Curve*

Section 835 provides: “Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and either: [¶] (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or [¶] (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.” (See also *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 68.)

Here, a triable issue of fact exists regarding whether the curvature of that portion of the highway where the subject accident occurred constituted a dangerous condition. While Seltzer opined that the post-reconfiguration curvature was not a dangerous condition, Krueper testified that the curvature did constitute a dangerous condition. In this regard, not only did the experts dispute the sharpness of the curvature following the June 2001 roadway improvement project, Krueper found that the curve was even sharper following the June 2001 roadway project, arguably rendering it more dangerous than it was prior to the project.

Furthermore, a triable issue of fact exists regarding whether the County had notice of the alleged dangerous condition.³ (§ 835, subd. (b).) Based upon the accident history

³ In passing, appellants assert that “[t]here is some evidence that the dangerous condition of the curve that existed on the date of the subject accident was created by a negligent or wrongful act or omission of an employee of” the County, thereby giving rise

of the highway, it is disputed whether the County was on notice of the alleged dangerous condition. As Krueper testified, the accident rate for the subject section of highway was significantly greater than the statewide average for a comparable highway and the cross-median accident rate was so high that it warranted considering the installation of a median barrier. This evidence is sufficient to create a triable issue of fact as to whether the County was on notice of an alleged dangerous condition. (*Genrich v. State of California* (1988) 202 Cal.App.3d 221, 227-228.)

The County dismisses this evidence by contending that the only relevant history is after the June 2001 reconfiguration project. Because appellants' accident was the first and only head-on collision from June 2001 through 2002, the County claims that it could not have been on notice of the alleged dangerous condition.

We are not persuaded by this theory. As set forth above, a triable issue of fact exists regarding whether a dangerous condition existed in that portion of the highway where appellants were injured (and Plyley was killed). If the highway is in fact more dangerous than it was prior to the June 2001 reconfiguration, then the reconfiguration project could not simply wipe the slate clean and eradicate the County's prior notice of the problem.

Our conclusion is bolstered by the County's argument that there was no evidence that the June 2001 reconfiguration project was intended to remediate the condition of the curve.⁴ If the June 2001 reconfiguration project was not intended to mitigate the

to liability pursuant to section 835, subdivision (a). Given that this argument was not raised below, not supported by any citation to any evidence, and not fully developed or substantiated by any legal authority, we deem it waived. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116; *In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501; *Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1050.) And, to the extent this argument is somewhat flushed out in their reply brief, it is well-established that we do not consider arguments first raised in a reply brief. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.)

⁴ We recognize that the parties dispute whether the June 2001 reconfiguration project was intended to be a reasonable remediation of the allegedly dangerous curve.

sharpness of the curve of the highway, the County should not be permitted to rely upon it to erase its prior knowledge of a dangerous condition.

Finally, it is disputed whether the County is immune from liability pursuant to section 835.4, subdivision (b). That statute provides, in relevant part: “A public entity is not liable under subdivision (b) of Section 835 for injury caused by a dangerous condition of its property if the public entity establishes that the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable. The reasonableness of the action or inaction of the public entity shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury.”

Quite simply, the experts disagreed as to whether the County demonstrated use of all appropriate traffic control devices and warning signs. While Seltzer contended that warning signs (which had existed since 1994) were sufficient, Krueper opined that the signs were insufficient given that subsequent to their installation, the accident rate remained more than 10 times the median barrier warrant rate and that “the most effective manner to remedy this dangerous condition would be the installation of a median barrier.” (See *Cornette v. Department of Transportation*, *supra*, 26 Cal.4th at p. 68 [“The state’s failure to erect median barriers to prevent cross-median accidents may result in [dangerous condition] liability”].) This factual dispute cannot be resolved by way of summary judgment.

We express no opinion as to the intention of the project; we only comment that the County’s position is unavailing with respect to defining the relevant time period for purposes of notice.

DISPOSITION

The order and judgment of the trial court are reversed. Appellants are entitled to costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
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_____, J.
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